In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-642

MATHUE'S SUPER LIQUOR STORES, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Petitioners, who own and operate a chain of six retail liquor stores in Broward County, Florida, sued the Secretary of Labor for a declaratory judgment that an employment contract in which their cashiers agreed to "voluntarily repay" any and all cash register shortages would not violate the Fair Labor Standards Act even though the "voluntary payments" reduced their wages below the minimum prescribed by the Act. The Secretary counterclaimed for an injunction against further violations of the Act and for an order restraining the continued withholding of unpaid wages resulting from petitioners' practice of not paying for all hours of work and their further practice of recouping shortages, either by payroll deductions or by requesting the cashiers to make up the shortages.

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The district court ruled in favor of petitioners in the declaratory judgment action and in favor of the Secretary on the counterclaim (Pet. App. 23–32). On appeal, the court of appeals affirmed the portion of the ruling upholding the Secretary's counterclaim and reversed the ruling in the declaratory judgment action. With respect to the latter, the court held that an agreement whereby the employee obligates himself to repay cash register shortages as a condition of his employment violates the minimum wage provisions of the Fair Labor Standards Act to the extent that the repayments result in a reduction of earnings by the employee below the statutory minimum wage, even though the repayment does not take the form of a direct deduction from wages.

2. Petitioners' sole challenge to the decision of the court of appeals is that its disapproval of their proposed employment agreement violates their freedom of contract guaranteed by the Fifth Amendment, citing in support of this contention two decisions rendered by the Court during the early 1900's, *Lochner* v. *New York*, 198 U.S. 45, and *Coppage* v. *Kansas*, 236 U.S. 1. However, petitioners overlook the fact that the same freedom of contract argument was subsequently advanced and rejected by the Court in its first decision under the Fair Labor Standards Act. See *United States* v. *Darby Lumber Co.*, 312 U.S. 100, 108, 125. Moreover, since *Darby* the courts, including this Court, have consistently held that "private contracts" which have the effect of "circumventing or invading the command of the Wage and Hour Act" are invalid. See, *e.g.*, *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 706;

Mitchell v. *Turner*, 286 F.2d 104, 106 (C.A. 5); *Handler* v. *Thrasher*, 191 F.2d 120, 123 (C.A. 10); *Cascrta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 946 (C.A. 2). Here, as the court of appeals noted, the recoupment required by the proposed agreement, whether voluntary or not, and whether paid for "out of [the employees'] wages or other resources," will reduce the amount of their wages, and when they are "reduced below the required minimum wage, the law is violated" (Pet. App. 6).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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